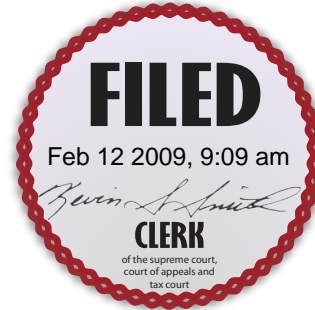


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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APPELLEE PRO SE:

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Logansport, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

JASON C. BURKETT,
Appellant-Defendant,

vs.

WINTER LOUTHAIN (SHIDLER),
Appellee-Plaintiff.

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No. 09A02-0802-JV-160

APPEAL FROM THE CASS CIRCUIT COURT
The Honorable Julian L. Ridlen, Judge
Cause No. 09C01-0409-JP-00100

February 12, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Jason Burkett (“Burkett”) filed a petition in Cass Circuit Court to modify visitation to his minor child. The court granted Burkett’s petition in part, yet Burkett appeals and argues that the trial court abused its discretion by restricting Burkett’s parenting time without first making findings required by Indiana Code sections 31-14-14-1 and -2. We remand for proceedings consistent with this opinion.

Facts and Procedural History

Burkett is serving a forty-year aggregate sentence in the Wabash Valley Correctional Facility for his 2004 convictions for Class B felony rape, Class B felony sexual deviate conduct, Class D felony sexual battery, and Class D felony criminal confinement. The victim of those offenses, W.L., and Burkett have a child, D.B. born on May 16, 2001. On June 10, 2005, Burkett petitioned the Cass Circuit Court for visitation with his child. His petition was initially denied without a hearing, and Burkett appealed. On appeal, our court held that the trial court was required to hold a hearing on Burkett’s petition. See Burkett v. W.T., 857 N.E.2d 1031, 1033 (Ind. Ct. App. 2006).

On remand, the court held a hearing on Burkett’s petition. Shortly thereafter, on April 20, 2007, the court issued an order granting parenting time to Burkett once a month “and at such other times as [W.L.] may agree, provided the paternal grandmother makes arrangements for the transportation and accompanies the child.” Appellant’s App. p. 84.

On December 12, 2007, Burkett filed a petition for modification of the parenting time order in which Burkett alleged that W.L. had not made D.B. available to his paternal grandmother for visitation as required by the parenting time order. Burkett asked the court to modify its order to allow him telephonic communication and written

correspondence with D.B., and to allow other members of his family to transport D.B. to the prison for visitation. Burkett also asked the court to order W.L. to share the costs of transporting D.B. to the prison for visitation and to “mandate that visitations are to occur at [] specified times.” Id. at 72.

On January 18, 2008, the court issued its order finding W.L. in contempt of the visitation order, but withheld sanction pending compliance with the orders of the court. The court modified its original parenting time order by allowing Burkett’s mother, brother, and grandmother to transport and accompany D.B. to the prison for visitation. The court also ordered that any communication with D.B. and “any communication concerning school performance or health or other issues occur through [Burkett’s] family.” Id. at 9. Burkett now appeals.

Discussion and Decision

Indiana Code section 31-14-14-1 (2008) provides in pertinent part that “a noncustodial parent is entitled to reasonable parenting time rights unless the court finds, after a hearing, that parenting time might: (1) endanger the child’s physical health and well-being; or (2) significantly impair the child’s emotional development.” An order granting or denying parenting time rights may be modified “whenever modification would serve the best interests of the child.” See Ind. Code § 31-14-14-2 (2008).

Burkett argues that the trial court abused its discretion when it restricted his parenting time rights without first finding that “a restriction would be in the best interests of said child under [Indiana Code section] 31-14-14-2 or that, without such a restriction,

it would endanger the child's physical health or impair his emotional development under [Indiana Code section] 31-14-14-1." Appellant's Br. at 4.

The statutory language of section 31-14-14-1 is clear and unambiguous, and provides that parenting time may not be restricted absent a finding by the court that the interaction might endanger the child's health or significantly impair his or her emotional development. Barger v. Pate, 831 N.E.2d 758, 763 (Ind. Ct. App. 2005). A party who seeks to restrict a parent's visitation rights bears the burden of presenting evidence justifying such a restriction. Farrell v. Littell, 790 N.E.2d 612, 616 (Ind. Ct. App. 2003).

The trial court did not make the requisite findings as required by section 31-14-14-1, and did not find that restricting Burkett's visitation was in D.B.'s best interests as required by section 31-14-14-2. Therefore, we must remand this case to the trial court with instructions to enter an order containing findings sufficient to support its order restricting Burkett's visitation with D.B. or enter an order that does not contain a visitation restriction. See id. (quoting In re Paternity of V.A.M.C., 773 N.E.2d 359, 360 (Ind. Ct. App. 2002)). Given the circumstances presented in this case, i.e. that Burkett is serving a forty-year term in the Department of Correction for sex offenses committed against D.B.'s mother, it should be a simple matter on remand for the trial court to enter a new order with the findings required by sections 31-14-14-1 and 2.¹

¹ Burkett's main challenge to the parenting time order is the restriction on his ability to communicate with D.B. The trial court's order restricts telephonic communication and communication concerning school performance, health, or other issues to times when D.B. is visiting Burkett's family. We observe that W.L. is understandably reluctant to have any contact with Burkett and to allow him to have access to her home via telephone, mail, or electronic communication.

Remanded for proceedings consistent with this opinion.

BAILEY, J., and BARNES, J., concur.